on a carefully prepared and perfectly level concrete bed. In either case the machine is affixed by being adapted to its environment, and I cannot see that it is of the least importance whether the adaptation consists in building up or in levelling down, in steadying by bolts and nuts, or in making use of the weight of the machine itself where weight is sufficient to secure the requisite stability.

I have already said or implied that in the question whether an article in its nature moveable is attached to the heritable estate, the law can only, as I think, establish presumptions. The actual decision must depend on the facts of the case, and I think it results from the decisions that the presumption for attachment to the inheritance is stronger in the case of machinery used for industrial purposes than in the case of articles of domestic utility or ornament which are usually carried by the owner from one residence to another. One reason for the distinction may be found in the fact that a building which is to contain machinery is generally designed to carry the special machinery that is to be put into it. In any case the size and proportions of the building, the strength of its walls and girders, and the light and heat required, are elements which depend on the nature of the work to be done in the building, and the mechanism by which that work is to be carried on. I need hardly say that the degree of mutual adaptation of building and machinery will vary in different trades, and therefore there can be no absolute rule as to machinery in general, but only a presumption. In the present case the more valuable articles in dispute are lace looms, placed in a weaving-shed of suitable construction, and so proportioned to the dimensions of the looms that the uppermost part of the frame (I think it was called the Jacquard frame) admits of being bolted to the frame of the roof of the building. I think this is sufficient adaptation of the machine to the building to satisfy the notion of fixation or attachment to the inheritance.

I do not propose to enter on a review of the decisions, but I desire to express my concurrence in the recent judgment of the High Court in England under which textile machinery was held to pass with the freehold. I may also notice that this decision accords with the earliest considered judgment of our Court—I mean the case of *Arkwright* v. *Billinge*, reported in the Faculty Collection, 1819, where the machinery of a cotton-mill was held to be included in a heritable security over a mill. Although the validity of this decision is questioned by Bell, whose opinion on such a matter will always receive most respectful consideration, I am not aware that in principle this case has been overruled by a decision of this Court.

The law of Scotland does not enable the owner of moveables to give a creditor a security over them without possession, but where they have been incorporated with the heritable estate the aggregate subject may of course be conveyed to a creditor by bond and disposition in security. It is not disputed that the words of conveyance are sufficient to carry the machinery if the machinery has been made heritable by being affixed in the legal sense of the term. I see nothing to regret in this result—I mean there is no reason of public policy that I can see against a millowner being allowed to use as a fund of credit the machinery which he has fitted to buildings adapted to receive it. I agree that the judgment of the Sheriff Court is right, and that the appeal should be dismissed.

LORD ADAM and LORD KINNEAR concurred.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Appellant—Campbell, K.C.—Younger. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents—Clyde, K.C.—M'Clure. Agents—Macpherson & Mackay, S.S.C.

Friday, December 5.

FIRST DIVISION.

[Sheriff Court at Glasgow.

HARPER *v.* JAMES DUNLOP & COMPANY (1900), LIMITED.

Reparation—Negligence—Master and Servant—Common Law — Unloading Rails from Bogie—Wrong System of Unloading—Too Few Men Employed at Particular Job—Process—Jury Trial—Issue at Common Law and under Employers Liability Act—Issue at Common Law Refused.

A platelayer in the employment of a limited liability company, carrying on business as iron and coalmasters, was engaged in laying a new single line of railway at their works, under the direction of a foreman platelayer, and was injured while pulling a rail off a bogie. In an action at his instance against his masters for damages for personal injuries at common law and also under the Employers Liability Act 1880, he averred, *inter alia*, that the accident was caused by the fault of the defenders, their manager, assistant manager, and foreman—(1) through a wrong system of removing the rail being employed, and (2) through too small a number of men being engaged at the work, three of the eight men forming the squad having been previously sent away to other work. He further averred that the wrong system was only adopted or permitted to be adopted by the defenders, their manager, assistant-manager, and foreman, owing to the reduced number of men, and that they should, and easily could have, obtained a greater number of workmen by recalling the three sent away or calling in others of their workmen. *Held* that no relevant case at common law had been stated, and issue at common law *refused*.

Thomas Harper, platelayer, raised an action in the Sheriff Court at Glasgow against James Dunlop & Company (1900), Limited, in which he prayed the Court to grant decree for £500, or otherwise for £150, or such other sum, less or more, as might be found to be due to him under the Employers Liability Act 1880.

He averred that on 3rd April 1902 he was in the employment of the defenders at their Clyde Ironworks, near Tollcross, and was one of a squad of platelayers who were engaged in laying a new single line of railway, upon the instructions and under the direction and superintendence or management of Mr Rogerson, manager, Mr Wallace, the under-manager, and Robert Campbell, the foreman platelayer there. He averred further — "(Cond. 4) Upon said date a bogie containing rails to be used in laying the said new line of railway was brought forward along the railway as far as the same had been laid, and having been stopped at or near the termination thereof, the said Robert Campbell instructed the squad of workmen, of whom the pursuer was one, to pull the rails off the bogie—that is to say, the rails which lay on the bogie projecting beyond same at either end were to be dragged along the top and forward over the front of the bogie, a roller or round pinch being put, it is believed and averred, underneath the rail to assist its motion. The bogie, it is explained, has a flat top like a table. (Cond. 5) Acting upon the orders or directions of the said Robert Campbell, the pursuer took hold of the front end of a rail which lay on the bogie near to the edge thereof, and was to be used in continuing one of the lines of rails, to assist in removing same from the bogie in the manner before mentioned, and the remainder of the squad being disposed at other parts of the rail, the men began to pull, their backs, or at least the back of the pursuer and of some of the men, being towards the bogie. They had only pulled the rail a part of the way along the top of the bogie when the rail and the roller or pinch underneath same, in consequence of the roller or pinch not being properly placed at right angles to the bogie and kept in that position, rolled to the side and over the edge of the bogie. This threw all the weight of the rail upon the men, who were unable to bear it up, with the result that the pursuer was knocked down by it, and the rail fell on his right leg fracturing it near the hip joint. (Cond. 6) It was the duty of the defenders and the said Mr Rogerson, Mr Wallace, and Robert Campbell to have appointed a larger number of men to remove the rail from the bogie, there being only five men out of the full squad of platelayers, and the said Robert Campbell, as foreman or superintendent, engaged at the work. The rail in question, which was at least 30 feet long and of great weight—though the pursuer is at present unable to condescend upon its exact weight—was much too heavy for the safe removal thereof from the bogie in the manner adopted by the number of men employed. The defenders and the said Mr Rogerson, Mr Wallace, and Robert Campbell knew or ought to have known of the insufficiency of men, and had they in accordance with their duty appointed additional hands to the work the pursuer would not have been injured. . . . (Cond. 7) The manner or system of removing the rail from the bogie by hauling it in the fashion condescended on was a most unsafe and dangerous and defective system, and was, it is believed and averred, only adopted or permitted to be adopted by the defenders and the said Mr Rogerson, Mr Wallace, and Robert Campbell because of the reduced number of men in the squad at the time. This number was insufficient to lift the rail bodily from the bogie and deposit it on the ground in its position, as was intended, to form a continuation of one of the lines of rails. To lift the rail thus is the customary and the proper and safe method of conducting such an operation where the aid of machinery is not procurable. By such a method no danger is incurred to the men employed. Ten men, or at the very least eight, would have been necessary to remove the rail in the latter manner, but as only five men of the squad and the said Robert Campbell were present (three of the squad having been dispatched previously to a job in another part of the defenders' works), the defenders and the said Mr Rogerson, Mr Wallace, and Robert Campbell culpably and negligently resorted to the rash and dangerous and defective manner or system condescended on for removing the rail from the bogie, or permitted same to be resorted to. The danger of an accident happening in the manner condescended on was or ought to have been evident to the defenders, and the said Mr Rogerson, Mr Wallace, and Robert Campbell as persons of skill and experience. It was their duty to have provided or obtained the assistance of a greater number of men before beginning the operation, as they might easily have done by recalling the said three men forming part of the squad, or calling in others of defenders' workmen to assist, or to have seen before the said operation was begun that a sufficient number of men were provided. (Cond. 10) The injuries to the pursuer were due to the fault and negligence of the defenders and the said Mr Rogerson, Mr Wallace, and Robert Campbell, for whom they are responsible, (*a*) in failing to provide an adequate number of men to carry out the operation of removing the said rail from the bogie; (*b*) in removing the rail from the bogie upon an unsafe, dangerous, and defective system; (*c*) in failing to place the roller or pinch properly underneath the rail, or to see that it was so properly placed and kept in that position, and to provide and station a man at the side of the bogie and rail to guard against danger to the workmen removing the rail, and warn them of such danger, or to take any precautions for the safety of the men performing said operation; and (*d*) in ordering or directing or permitting the pursuer to remove the rail in the manner described, all as before condescended upon."

On 17th July 1902 the Sheriff-Substitute (STRACHAN) allowed a proof before answer.

The pursuer appealed for jury trial, and proposed an issue scheduling damages at common law as well as under the Employers Liability Act 1880.

Counsel for the defenders consented to the issue being allowed so far as laid under the Act, but argued that no issue at common law should be allowed as no relevant case to support such an issue was stated on record. There was no averment of a defective system in the works, nor of insufficiency of foremen, workmen, and tools there. The only fault was that of the foreman, and the usual course in such a case was to disallow the issue so far as at common law—*Robertson* v. *Linlithgow Oil Company*, July 18, 1891, 18 R. 1221, 28 S.L.R. 863; *Loughney* v. *Caledonian Railway Company*, January 7, 1902, 4 F. 401, 39 S.L.R. 289.

Counsel for the pursuer argued that where a good case under the Act was disclosed, it was usual to allow also the issue so far as at common law if it were thought that there was any case at all within the record which might be developed at the trial—*Henderson* v. *John Watson, Limited*, July 2, 1892, 19 R. 954, 29 S.L.R. 815; *M'Mullen* v. *Newhouse Coal Company*, May 27, 1896, 23 R. 759, 33 S.L.R. 598. Here there was fault in regard to number of men and system of working, and knowledge of this was averred against the defenders.

LORD ADAM—The defenders here are a limited company carrying on business as iron and coalmasters. The pursuer was a workman in their employment, who on 3rd April 1902 met with an accident, and he has raised the present action to recover damages in respect of the injuries resulting to him from that accident. The conclusions of the action are, *first*, for decree for £500, and *second*, or otherwise to grant decree for £150 in respect of the defenders' liability under the Employers Liability Act 1880.

Now, the accident happened in this way. These coalmasters had occasion to lay a new line of railway in their premises. The rails were brought to the spot, for the purpose of being laid, on a bogie. They were of very considerable size and weight, and it appears that when they were being taken off the bogie one of them capsized or tumbled off the bogie and so injured the pursuer. Now, except for the Employers Liability Act, the defenders here would not have been liable for an accident arising from the fault of a fellow servant or the fellow servants of the injured workman, and that appears to be the main ground of liability averred here, for there is a very distinct averment that the accident in question was occasioned by the fault of, among others, Robert Campbell, who was the foreman in charge of the gang or squad of workmen with whom the pursuer was working at the time of the accident. The further averment is that the pursuer was acting upon the orders of Campbell when he met with the accident, and that being a very distinct averment of liability under the Act, Mr Hunter very properly did not resist an issue under the Act. But then Mr Hunter says that there is no averment relevant to infer liability against the defenders at common law, and I think he is right. The defenders are a company, and must necessarily depute the superintendence of their operations to managers. They would be liable, no doubt, if they failed to appoint competent managers, or if they did not supply sufficient plant and material, or if they failed to supply sufficient men to carry out their work, or again, if they knew of a defect in the system which was adopted and carried on in the works, which resulted in an accident. But, apart from the Act, they would not otherwise be liable for an accident occurring in the ordinary course of carrying on the work. In this particular case there is no averment of any defect in the material used, and so far as any defect of system is averred I do not think that, although the unloading of the bogie is said to have been done under a system, it formed a usual operation in the ordinary course of the defenders' work at all. It occurred while a particular job was being carried out in a particular way. Campbell had a gang of eight men, and it is averred that he had sent away three of these to a job at another part of the defenders' works before taking in hand the unloading of the rails. Then it is said that ten men, or eight at the very least, were necessary to remove a rail from the bogie, and that in consequence of three having been sent off elsewhere, Campbell attempted to do it with five men. Now, as Lord M'Laren in the course of the discussion asked, is it to be expected that the defenders were to know that three men had been sent temporarily away to another job, and should they have known that the five that were left were proceeding to do the work without them. There was no such duty on the defenders, and averments to that effect would not have been relevant. But there are no such averments. All that is said is that the workmen proceeded to put a pinch under the rail to assist its motion, that they did not put it properly at right angles to the bogie, so that the rail rolled to the side and over the edge of the bogie. Is it possible to say that that was the fault of anyone but the foreman and the workmen under him. The accident averred therefore was simply due to the fault of the foreman in either beginning to do the work with too few workmen, or in bungling the execution of it. It is not averred that there was not a sufficiency of workmen in the works for the operation. It is said that a greater number of men might have been obtained "by recalling the said three men forming part of the squad, or calling in others of defenders' workmen to assist."

I think, therefore, that we should dismiss the first conclusion of the summons, and allow an issue only under the Act.

LORD M'LAREN—It is quite true that in both Divisions of the Court cases of doubtful relevancy have been sent to a jury on

the double issue. It is perhaps an element for consideration that in England cases of this kind go to a jury without any previous consideration of their relevancy. But then it must be kept in mind that the control of the courts in England over the verdicts of juries is very much greater than we possess, and this Court has been in the habit of considering the relevancy of an action of damages when invited by counsel to do so.

In this case I agree with Lord Adam that there is no relevant averment of personal fault on the part of the defenders, and I may say that agents and counsel are not in any way responsible for the want of averments of such liability, because the facts of the case, however they are stated, are such as to make it evident that there could be no question of personal fault. The fault, if fault there be, seems to be that of the foreman in charge of the operation, either in not employing a full squad of men, which he had it in his power to do, or in proceeding with the work in a careless manner with the limited number of men which he had at his disposal.

I think that the pursuer has stated a relevant case under the Act of 1880.

LORD KINNEAR—I had some difficulty in considering this case, because it comes very near the line which divides the cases which ought to be sent to a jury before answer on the question of relevancy and those in which that question may properly be decided at once. I adhere entirely to the decision of this Court in *Henderson's* case, and I also agree with the decision in the case of *M'Mullen* in the Second Division. I think these decisions are quite in accordance with our own practice, and I do not inquire how far they correspond with the practice in England. If I could find, after careful consideration, any room for doubt whether there might not be a good case at common law within the limits of this record, I should be prepared to send the case to the jury on both grounds. But then after the very careful examination of the averments given at the bar, I think the true result is just what Lord Adam has said, and that there is no relevant averment of liability except under the Employers Liability Act. I am not prepared to criticise too strictly the averments of the pursuer, but still we must distinguish between general allegations of fault which have been made without the framer of the condescendence having in his mind any specific fault, but which are intended to let in any ground of fault which may suggest itself at the trial, and the case of averments really intended to charge against the defender some specific fault or specific breach of duty. Now, I think all the averments in this case are of the former kind. There is no specific averment of a specific fault charged against the defenders alone and as distinguished from persons in their employment, but throughout the record, whenever the pursuer undertakes to aver the duty which he charges the defenders with neglecting, it is said to have been the duty of the defenders and their manager, and their assistant-manager and their foreman. He does not attempt to distinguish between duties for which the defenders themselves are directly responsible and duties for which they are responsible only as the employers of those who are immediately charged with their execution. Now, I agree with Lord Adam that the general result of a fair construction of the averments is that the accident is attributable to two faults—1st. It is said that the foreman in charge of the operations having eight men under him allowed three of them to be diverted to something else, and proceeded to do the work with too small a number. I am unable to see that that was a fault of the company as distinguished from fault of persons in their employment. 2nd. It is said that in removing the rail from the bogie the roller instead of being placed square to the rail was placed at an angle, so that when the rail began to slide it moved sideways and fell off. That is the fault of the men engaged in the particular employment and of no one else. It is absurd to say that this was part of the system laid down by the directors for the execution of the work. Therefore, on the whole matter, I come to the conclusion that there is not a relevant averment of fault at common law, and as the pursuer by the form in which the conclusions of his summons are expressed challenges a decision on the relevancy of each conclusion separately (for he asks the Court to grant a decree ordaining the defenders to pay the sum of £500, or otherwise to grant a decree ordaining them to pay the sum of £150), we ought to consider the relevancy of the averments to support each conclusion separately, and as we think there is no relevant averment to support the first conclusion I think it should be dismissed.

LORD PRESIDENT—I have had extreme difficulty in deciding this point, but have come to the same opinion as your Lordships.

The Court pronounced this interlocutor:—

"Find that the action is irrelevant so far as laid at common law, and dismiss the same so far as regards the first conclusion of the summons: Approve of the issue so far as founded on the Employers Liability Act as the issue for the trial of the cause, and decern, reserving the question of expenses."

Counsel for the Pursuer and Appellant—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents—Hunter. Agents—W. & J. Burness, W.S.